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7

8
9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 PROGRESSIVE WEST INSURANCE)
COMPANY, an Ohio corporation,)

12 Plaintiff,)

13 vs.)

14 BUN BUN TRAN, LEONEL)
ARRELLANO,)

15 Defendants.)
16 _____)

CASE NO. 07 - CV 1999 JAH (POR)

**PLAINTIFF'S REPLY TO
DEFENDANT BUN BUN TRAN'S
OPPOSITION TO MOTION FOR
RECONSIDERATION**

Date: July 14, 2008
Time: 2:30 p.m.
Ctrm: 11
940 Front Street
San Diego, CA 9210

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19 Plaintiff Progressive West Insurance Company ("Progressive") submits the
20 following Reply to Defendant Bun Bun Tran's Opposition to Progressive's Motion
21 for Reconsideration:

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Throughout this litigation, counsel for Tran has consistently presented two
4 contradictory positions to this Court: (1) that Progressive cannot now allege damages
5 in excess of \$75,000 so as to meet the amount in controversy requirements for
6 diversity jurisdiction because the policy limits are \$15,000; and (2) that
7 simultaneously Progressive is liable to Tran for an “unlimited” amount of damages in
8 excess of \$40 million and that the policy limits are not the ceiling of Progressive’s
9 liability. This duplicity should not be rewarded.

10 Progressive’s motion for reconsideration demonstrated that new evidence ,
11 including Tran’s pleadings in this action subsequent to briefing of the motion to
12 dismiss, establishes that Tran’s own position is that the policy limits are “gone” and
13 the amount in controversy in this lawsuit exceeds \$40 million. Despite this, Tran’s
14 Opposition ignores the majority of the new evidence submitted by Progressive.
15 Instead Tran sets up a straw man, contending the “fact” that Tran seeks an assignment
16 of Arrellano’s bad faith rights does not constitute new evidence. What Progressive
17 contends is that the new evidence of Arrellano’s willingness to assign his rights,
18 coupled with Tran’s new statements that Progressive’s potential liability is in excess
19 of \$40 million, shows that the amount in controversy requirement is met here. Tran’s
20 knocking down of his own straw man does not address, much less defeat
21 Progressive’s argument.

22 Tran’s Opposition also fails to distinguish or refute authority cited by
23 Progressive which provides that this Court may rely on Progressive’s potential bad
24 faith liability to Tran in evaluating the jurisdictional amount in controversy, and that
25 defendant Arrellano’s policy limits are not determinative of the amount in
26 controversy in declaratory relief actions that involve the applicability of an insurance
27 policy to a particular occurrence. Progressive’s declaratory relief action seeks a
28 ruling that Tran’s January 26, 2007 letter, a purported policy limits demand, is not an

1 effective demand for policy limits. If it was, and if Progressive unreasonably refused
2 it, then the policy limits would be “opened up,” assuming an over limits judgment
3 was obtained against Arrellano. Thus, the object of the litigation and the amount in
4 controversy is not dictated by the stated limits of the policy. Moreover, Tran
5 contends the \$15,000 limits are non-existent. As a result, the amount at stake here is
6 the value of Tran’s underlying claim, valued by Tran at \$40 million, and for which
7 Tran contends Progressive must indemnify Arrellano.

8 For the reasons set forth in its Motion and this Reply, Progressive respectfully
9 requests that this Court review the new evidence submitted by Progressive and
10 reconsider its dismissal of this action.

11 **STATEMENT OF FACTS**

12 Tran’s Opposition resorts to misrepresenting the nature of the new evidence
13 submitted in support of Progressive’s Motion for Reconsideration, erroneously
14 asserting that the new evidence merely consists of pre-existing negotiations for an
15 assignment of defendant Arrellano’s (alleged) bad faith rights to Tran. (Doc. 23 at 1,
16 5-6.) This is a mischaracterization of Progressive’s Motion. The *existence* of such
17 negotiations is not the new evidence presented by Progressive’s Motion; in fact, the
18 Complaint itself acknowledges that Tran has sought from Arrellano an assignment of
19 Arrellano’s bad faith rights.

20 Rather, the motion for reconsideration is based on new evidence that *Arrellano*
21 is now willing to assign his bad faith rights to Tran in exchange for a covenant not to
22 execute, and that on March 31, 2008, Arrellano’s attorney transmitted a new proposed
23 assignment and covenant to both Tran and Progressive. (Doc. 18 at 2-3 and Exh. 1.)

24 The newly discovered evidence also consists of Tran’s own attorneys’
25 declarations and pleadings in this case, filed on April 28, 2006, the same day as this
26 Court’s Order granting Tran’s Motion to Dismiss. (See Docs. 13, 14.) This evidence
27 is that Tran’s attorney confirmed that he had been negotiating an assignment of
28 Arrellano’s bad faith rights against Progressive. (Doc. 13, Angelo Decl. at ¶ 5.) The

1 new evidence further consists of Tran's factual statement that Progressive is
2 responsible to indemnify Arrellano for damages well in excess of the amount in
3 controversy and in excess of the stated policy limits. (Doc. 13 at 3 ["The damages
4 caused by Arrellano will exceed \$40 million dollars. ... It is Tran's position that
5 Progressive is now responsible to indemnify Arrellano for an unlimited amount of
6 potential damages due to Progressive's failure to settle for Arrellano's policy limits"]
7 (emphasis added).) In other words, Tran's position is that Progressive's liability is
8 not limited to the \$15,000 policy limits.

9 The \$40 million dollar figure for Tran's damages (for which Tran holds
10 Progressive responsible) is confirmed again in Tran's Motion for Sanctions: "Tran's
11 future lifetime medical care costs will be in the range of \$40 million dollars." (Doc.
12 16 at 1 and Di Monda Declaration.) According to correspondence sent by Tran's
13 attorneys, Progressive's potential for liability is not merely "speculative." A May 1,
14 2008 letter from Tran's counsel to counsel for Progressive in this lawsuit states: "As
15 you know, Arrellano has admitted fault. An over limits judgment against him will
16 occur." (Reply **Exh. 1** at 4.) "... I assume Progressive will later sue Bun Bun Tran
17 again in federal court once I obtain a large over limits' judgment in state court against
18 Arrellano." (Reply **Exh. 1** at 2.)

19 Contrary to those statements, apparently for purpose of opposing Progressive's
20 motion for reconsideration, Tran's attorneys now take the convenient position that
21 there are "currently" no negotiations for an assignment of Arrellano's bad faith rights
22 to Tran. (Doc. 23 at 7 and Angelo Declaration at ¶ 6.) This statement is
23 disingenuous for several reasons. First, there is nothing stopping Tran's counsel from
24 renewing his attempts to obtain an assignment of Arrellano's bad faith rights after the
25 hearing date of this motion. Second, it surely rings hollow that Tran's attorneys
26 would simply give up on obtaining rights they value in excess of \$40 million. Third,
27 Tran's argument is based on Mr. Angelo's "opinion" that Progressive has interfered
28 in negotiations and that Mr. Winet "has abandoned his client." (Doc. 23 at 7 and

1 Angeleo Decl. at ¶¶ 7-9.) This “opinion” is argument, not evidence.

2 LEGAL DISCUSSION

3 **1. Progressive’s Motion for Reconsideration Is Timely Pursuant to Southern** 4 **District Local Rule 7.1.**

5 Progressive’s Motion for Reconsideration was filed timely pursuant to
6 Southern District Local Rule 7.1. Local Rule 7.1 permits motions for reconsideration
7 filed within “30 days from the entry of the ruling.” (Southern District Local Rule
8 7.1(i)(2); *Stephen v. Cota*, 2007 U.S. Dist. LEXIS 37222, *3-*4 and note 1 (S.D.
9 Cal. May 22, 2007) (Houston, J) (motion for reconsideration of dismissal);
10 *Qualcomm Inc. v. Broadcom Corp.*, 2006 U.S. Dist. LEXIS 85644, *6 (S.D. Cal.
11 Nov. 20, 2006); *Allen v. Reilly*, 2008 U.S. Dist. LEXIS 35753, *2-*3 and note 1 (S.D.
12 Cal. May 1, 2008) (motion for reconsideration of dismissal).

13 Tran erroneously contends, absent any supporting authority, that FRCP Rules
14 60 and 59 control motions for reconsideration, and that Rule 7.1 only relates to
15 “rulings, order or judgments unrelated to those dismissing a case.” (Doc. 23 at 4-5.)
16 Tran adds a gloss to the rule – it is not so facially limited. The Rule is broad,
17 encompassing reconsideration of all rulings, orders and judgments. See Rule 7.1(i).

18 Tran also argues that Local Rule 7.1(1)’s prefatory clause “[except as may [be]
19 allowed under Rules 59 and 60, no motion or application for reconsideration shall be
20 filed more than 30 days after the entry of ruling, order or judgment sought to be
21 reconsidered.” Tran misreads the “except as may be allowed” language. This
22 language is expansive – it allows more than 30 days when permitted by the FRCP - -
23 it does not curtail its own 30 day period if the FRCP contains a shorter period. The
24 Local Rule does not state “except as limited by. . . .” The Local Rule creates a
25 separate track distinct from a FRCP Rules 59-60 to seek reconsideration. It allows 30
26 days – except if the FRCP allows longer. For example, FRCP 60 allows for a
27 “reasonable time,” of up to one year after entry of judgment.

28 Tran’s position that this motion had to be filed within 10 days because of Rule

59 is contrary to this District's legal precedent. Under this Court's precedent, "[a] timely-filed motion for reconsideration under a local rule is considered a motion under Federal Rule of Civil Procedure section 59(e)." *Reeder v. Knapik*, 2007 U.S. Dist. LEXIS 51890, * 3-*4 (S.D. Cal., July 17, 2007)(emphasis added). The same principle holds true as to Rule 60. *Ground v. Sullivan*, 785 F.Supp. 1407, 1411, note 3 (S.D. Cal. 1992) ("Once an order of the court is entered, the judge can set aside or change it through a Rule 60 motion *or* a motion for reconsideration pursuant to Local Rule 7.1(i).") Local Rule 7.1(1) allows 30 days to file motions for reconsideration. Because Progressive's Motion was filed within 30 days of this Court's April 29, 2008 entry of judgment, it is timely under Rule 7.1.

2. Declaratory Relief Is Proper Even Where Liability Is Contingent.

Tran takes the position that because a bad faith lawsuit has not yet been filed against Progressive, the declaratory relief lawsuit is based upon "speculation" for purposes of meeting the amount in controversy requirement. (Doc. 23 at 6-7, 7-8.) Not so. Although Progressive's liability is contingent on Arrellano's liability to Tran in the underlying action, "[t]hat the liability may be contingent does not necessarily defeat jurisdiction of a declaratory judgment action." *Associated Indem. Corp. v. Fairchild Industries, Inc.* (2nd Cir. 1992) 961 F.2d 32, 35, citing *American Mach. & Metals, Inc. v. De Bothezat Impeller Co.*, 166 F.2d 535, 536, 76 U.S.P.Q. (BNA) 549 (2d Cir. 1948); *National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 670 F. Supp. 424, 430-31 (D.D.C. 1987); and *Lumbermens Mut. Casualty Co. v. Borden Co.*, 241 F. Supp. 683, 701 (S.D.N.Y. 1965). "Indeed, litigation over insurance coverage has become the paradigm for asserting jurisdiction despite 'future contingencies that will determine whether a controversy ever actually becomes real.'" *Associated Indem. Corp. v. Fairchild Industries, Inc.* (2nd Cir. 1992) 961 F.2d 32, 35, citing 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2757, at 586-587 (2d ed. 1983).

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1 **3. With the Addition of New Evidence, Progressive Has Demonstrated that it**
 2 **Has Met the Jurisdictional Amount in Controversy.**

3 In a declaratory judgment action, the amount in controversy is measured by the
 4 value of the object of the litigation. *Hunt v. Washington State Apple Advertising*
 5 *Commission*, 432 U.S. 333, 347 (1977). Dismissal is appropriate only if it appears to
 6 a “legal certainty” that the jurisdictional amount is not met. *See id.* at 346-48. The
 7 amount in controversy may be met from the viewpoint of either the plaintiff or
 8 defendant, that is, “the value of the thing sought to be accomplished by the action
 9 may relate to either or any party to the action.” *In re Ford Motor Co.*, 264 F.3d 952,
 10 958 (9th Cir. 2001). Here, the thing sought by plaintiff Progressive is a declaration
 11 by the Court that Tran’s “demand” letter is not a bonafide policy limits demand and
 12 that Progressive’s conduct in handling Arrellano’s claim did not “open” the limits on
 13 the policy, therefore exposing it to an “unlimited” amount of liability. It is claimed
 14 by *Tran* that this object of the declaratory relief action exceeds the \$15,000 policy
 15 limits and exceeds \$40 million.

16 New evidence demonstrates that Arrellano is now willing to assign his bad
 17 faith rights to defendant Tran. Additionally, new evidence in the form of Tran’s
 18 counsel’s pleadings, declarations and correspondence admits that the amount in
 19 controversy is in excess of “\$40 million dollars” and that, even in the absence of a
 20 “current” assignment of Arrellano’s bad faith rights to Tran, Progressive’s potential
 21 liability is not speculative, but real. (Doc. 13 at 3; Doc. 16 at 1; Reply **Exh. 1**.)

22 Statements of fact such as those contained in Tran’s briefs may be considered
 23 admissions of a party in the discretion of the district court. *American Title Insurance*
 24 *Company v. Lacelaw Corporation*, 861 F.2d 224, 226-227 (9th Cir. 1988). A judicial
 25 admission may establish the amount in controversy. *Valdez v. Allstate Insurance*
 26 *Company*, 372 F.3d 1115, 1117. Further, evidence such as Tran’s pleadings and
 27 letters are sufficient to establish the amount in controversy. See, e.g., *Cohn v.*
 28 *Petsmart, Inc.*, 281 F.3d 837, 839-840 (single letter from plaintiff constituted

1 sufficient evidence to establish amount in controversy where plaintiff consistently
2 maintained claim was worth more than \$100,000).

3 A recent decision demonstrates that Progressive's evidence meets the amount
4 in controversy requirement. In *Sentinel Insurance Company v. Haines*, 2008 U.S.
5 Dist. LEXIS 19260, *2-*3 (W.D. Mo., March 12, 2008), as here, the defendant,
6 argued that the jurisdictional amount was not met because the limit on the insurance
7 policy was \$50,000. In contrast, plaintiff insurer responded that the amount in
8 controversy exceeded \$75,000 where the defendant's demand letters were for
9 \$350,000 and \$500,000. (*Id.*)

10 The court held that in evaluating the jurisdictional amount, "courts often
11 consider such evidence as 'settlement offers by plaintiff exceeding the jurisdictional
12 amount, the plaintiff's refusal to stipulate that she would not demand more than the
13 jurisdictional amount, or an extensive list of serious and disabling injuries suffered by
14 t he plaintiff.'" (*Id.* at 5.) Where defendant, an injured third party, claimed damages
15 of \$500,000 for his serious injuries and refused to accept a policy limits offer, the
16 court found "that plaintiff has demonstrated by a preponderance of the evidence that
17 the amount in controversy exceeds \$75,000." (*Id.* at 5-6.)

18 Tran attempts to narrowly limit the authorities cited by Progressive's Motion to
19 their exact facts, ignoring the applicable legal principles governing the rationales of
20 the cases. Those principles are that this Court may consider a "promised bad faith
21 lawsuit"; "potential liability"; and "future claims" in evaluating the jurisdictional
22 amount in controversy. *Allstate Insurance Company v. Hilbun*, 692 F.Supp. 698,
23 700-701 (S.D. Miss. 1988); *Budget Rent-A-Car, Inc. v. Higashiguchi*, 109 F. 3d 1471,
24 1474, n. 2 (9th Cir. 1997); *The Prudential Ins. Co. v. Thomason*, 865 F. Supp. 762,
25 765 (C.D. Utah 1994).

26 Tran also contends that Arrellano's policy limits of \$15,000 establishes the
27 amount in controversy without further examination or inquiry. (Doc. 23 at 6-7.) This
28 is an incorrect statement of law. Only under certain circumstances do the policy

1 limits establish the amount in controversy. “Specifically, the policy limits are
2 controlling ‘in a declaratory action ... as to the validity of the entire contract between
3 the parties.’” *Hartford Ins. Group v. Lou-Con Inc.*, 293 F.3d 908, 911 (5th Cir.
4 2002). “However, in declaratory judgment cases that involve the applicability of an
5 insurance policy to a particular occurrence, ‘the jurisdictional amount in controversy
6 is measured by the value of the underlying claim – not the face amount of the
7 policy.’” *Id.*; *Budget Rent-A-Car, Inc. v. Higashiguchi*, 109 F. 3d at 1473. Contrary
8 to Tran’s contention, this principle applies equally to the situation where the amount
9 of the policy limit is below the amount in controversy requirement, but the underlying
10 claim extends beyond the limits of the policy as to the situation where the limit
11 exceeds the amount in controversy requirement, but the claim is below the diversity
12 jurisdiction monetary limit. This is particularly apt here when Tran himself claims the
13 policy limits do not limit Progressive’s exposure.

14 Tran’s Opposition fails to even address the remainder of Progressive’s
15 authorities demonstrating that the amount in controversy has been met. See *State*
16 *Farm Fire & Cas. Co. v. Carnnahan*, 2008 U.S. Dist. LEXIS 4922 (W.D. MO 2008)
17 (declaratory relief action in which liability for full amount of judgment without regard
18 to policy limits claimed is sufficient to meet jurisdictional limit, because potential
19 judgment in excess of minimum amount in controversy requirement); *Duin v. Allstate*
20 *Insurance Company* 1997 U.S. Dist. LEXIS 20882, *3-*6 (S.D. Cal. 1992) (burden of
21 satisfying amount in controversy met where court was provided with evidence that
22 similar bad faith claims “overwhelmingly result in verdicts well over the
23 jurisdictional amount” and insured did not represent that it would seek less than the
24 jurisdictional amount).

25 The new evidence submitted with Progressive’s Motion for Reconsideration
26 demonstrates to a legal certainty that the amount in controversy in this action exceeds
27 the jurisdictional minimum of \$75,000.

28 / / /

CONCLUSION

Progressive respectfully requests that this Court review the new evidence submitted by Progressive and reconsider its dismissal of this action.

DATED: July 7, 2008

ROBIE & MATTHAI
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PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 500 South Grand Avenue, 15th Floor, Los Angeles, CA 90071-2609.

On July 7, 2008, I served the foregoing document(s) described as:

**PLAINTIFF'S REPLY TO DEFENDANT BUN BUN
TRAN'S OPPOSITION TO MOTION FOR
RECONSIDERATION**

on all interested parties in this action by placing a true copy of each document, enclosed in a sealed envelope addressed as follows:

**Defendant Leonel Arrellano, In
Pro Per:**

Leonel Arrellano, Inmate #F77654
c/o Division of Adult Operations
Sierra Conservation Center
5100 O'Byrnes Ferry Road
Jamestown, CA 95327

Courtesy Copy via Mail

Hon. John A. Houston
Southern District of California
940 Front Street, Courtroom 11
San Diego, CA 92101-8900

(X) BY MAIL: as follows: I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Los Angeles, California.

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(X) BY E-SERVICE: I caused the above-referenced document(s) to be electronically served on the above counsel of record through the Court's CM/ECF filing and service system.

(X) (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 7, 2008, at Los Angeles, California.

s/Windy Gale Tyler
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